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Nos. 83-1231 and 83-1291

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE R. TESLOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE A. SOLOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrant in this case was supported by probable cause.

2. Whether the search warrant's description of the things to be seized satisfied the particularity requirement of the Fourth Amendment.

3. Whether the seizure of certain records belonging to petitioners' accountant violated any of petitioners' rights under the Fourth Amendment.

4. Whether the alleged failure of the agents executing the warrant to prepare an adequate inventory of the items seized required suppression of the evidence.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 2

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108 6

Andresen v. *Maryland*, 427 U.S. 463 9

Cady v. *Dombrowski*, 413 U.S. 433 11

Illinois v. *Gates*, No. 81-430 (June 8, 1983) 6, 7

Mancusi v. *DeForte*, 392 U.S. 364 10

Rakas v. *Illinois*, 439 U.S. 128 10

Spinelli v. *United States*, 393 U.S. 410 6

United States v. *Christine*, 687 F.2d 749 9

United States v. *Hall*, 505 F.2d 961 11

United States v. *Johnson*, 690 F.2d 60, cert. denied, No. 82-5869 (Feb. 22, 1983) 9

Constitution, statutes and rule:

U.S. Const. Amend. IV 8, 9, 10, 11

18 U.S.C. 1962(c) 5, 7

26 U.S.C. 7201 2

Fed. R. Crim. P. 41(d) 11

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-6a)[1] is reported at 725 F.2d 671. The oral findings of fact and conclusions of law of the district court denying petitioners' motion to suppress evidence (Pet. App. 25a-46a) are unreported.

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[1]"Pet. App." refers to the Appendix to the Petition in No. 83-1231.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari in No. 83-1231 was filed on January 25, 1984, and the petition for a writ of certiorari in No. 83-1291 was filed on January 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners, George A. Solomon and George R. Teslovich, entered conditional guilty pleas to charges of income tax evasion, in violation of 26 U.S.C. 7201. Solomon was sentenced to seven years' imprisonment and a $30,000 fine. Teslovich was sentenced to five years' imprisonment and a $30,000 fine. The court of appeals affirmed petitioners' convictions after rejecting their challenge to the district court's denial of their motion to suppress evidence seized from the offices of Solomon & Teslovich, Inc. (Pet. App. 4a-6a).[2]

1. The government's application for the search warrant at issue in this case was supported by an affidavit dated December 18, 1979, from Richard R. Geitgey, a Special Agent of the Federal Bureau of Investigation (Pet. App. 11a-17a). Geitgey represented that information regarding Solomon & Teslovich, Inc. had come to his attention while he was investigating a scheme involving commercial bribery and fraud on the part of Suncrest Environmental Resources, Inc. (SERC) and its owner, Phillip Gaziano. Henrietta Foster, an employee of SERC and secretary to Gaziano, admitted to Geitgey that she had taken part in the scheme.

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[2]The court of appeals also affirmed the conviction of petitioners' co-defendant, George R. Teslovich, Jr. The younger Teslovich, who received a sentence of three years' imprisonment with all but 179 days suspended, a $10,000 fine, and three years' probation with a requirement of community service, has not sought review in this Court.

She said that Gaziano had instructed her to prepare and cash forged checks. Gaziano then used the money to pay off one Alfred Royster, Jr., an employee at a power plant that purchased coal from SERC. In return, Royster would manipulate coal samples so that SERC would be paid more than its coal was actually worth. *Id.* at 11a-12a.

Geitgey personally interviewed Gaziano, who said he barely knew Royster. It was established through a travel agency, however, that Gaziano sent Royster on a trip abroad paid for with SERC funds. An official at the Hatfield Power Station confirmed that Royster was in a position to manipulate coal samples and had been under suspicion for that type of activity. In monitored conversations, Gaziano attempted to persuade Foster to refrain from mentioning Royster when she appeared before a grand jury. Pet. App. 12a-13a.

Gaziano told Geitgey that, prior to October 1977, he had worked as an accountant for Solomon & Teslovich (Pet. App. 13a). As Geitgey further related in the affidavit (*id.* at 13a-14a):

> 7. Henrietta Foster also stated that in November of 1977, when she first became employed for Gaziano as a secretary-bookkeeper, Gaziano gave to her two manila packages, which Gaziano told Foster contained records of Solomon and Teslovich, Inc., business transactions, which occurred while Gaziano was employed at S and T. Gaziano explained to Foster that the records were "hot" and were very incriminating to S and T. Gaziano went on to explain that if the records got into the "wrong hands", the records could cause a "fire".
>
> 8. Henrietta Foster further stated that Gaziano was very concerned about the FBI's inquiries pertaining to the operations of SERC and on July 17, 1979, asked Foster to retrieve the records, which she had been

keeping for Gaziano, pertaining to S and T. Foster explained to Gaziano that the records were at the home of her son in Oil City, Pa. and that it would take at least one day to retrieve the records. Gaziano instructed her to retrieve the records and return them to him for destruction.

9. I was able to verify the existence of Gaziano's "hot" records of S and T when Henrietta Foster voluntarily produced the records for the undersigned. In my presence, the two packages were opened, and documents pertaining to S and T and Redstone Hauling Co. were reflected throughout the two packages. Those records pertaining to 1976 and 1977 were copied in my presence and then returned to Ms. Foster who stated she returned them to Gaziano.

The affidavit went on to explain that Geitgey and Special Agent Thomas Powers, an accountant, had examined the records produced by Henrietta Foster. They found notations on ledger sheets and check stubs indicating that money was distributed to persons other than the named payees. Some of the names or initials noted corresponded to the names or initials of individuals holding responsible positions in entities with which Solomon & Teslovich did business, such as United States Steel Corp., the Pennsylvania Department of Transportation, and Laborer's Union Local 1308. Pet. App. 14a-16a.

The affidavit further stated (Pet. App. 16a) that:

16. I interviewed Brenda Royster of the Second National bank of Masontown who is a teller at said bank and who stated to me that an individual by the name of Pat Burns who is known to her as an employee of S and T appears at her teller window and cashes S and T checks payable to other companies — with scribbled endorsements — in amounts so large that the teller often has to get additional cash from the vault.

Special Agent Geitgey concluded his affidavit by expressing the belief that Solomon & Teslovich, Inc. was engaged in conduct in violation of 18 U.S.C. 1962(c) (Pet. App. 17a). Attached to Geitgey's affidavit was Special Agent Powers' detailed description of the records produced by Henrietta Foster (*id.* at 18a-24a). Also attached were copies of the records that had been examined (Solomon App. 55a-126a).[3]

Initially, the affidavit of Special Agent Geitgey was submitted to a magistrate without the statement of Special Agent Powers or copies of the Foster documents. The magistrate declined to issue a warrant solely on the basis of the affidavit. He requested Agent Powers' summary of the records and the documents themselves, examined them overnight, and then issued the warrant (Teslovich App. 251-252).

2. Petitioners moved to suppress the evidence seized pursuant to the search warrant and to dismiss the indictment against them (Pet. App. 26a). After a hearing on the motion to suppress, the district court concluded that Foster's statements to the investigating agents, together with the copies of apparently incriminating records that she provided to them and the information Special Agent Geitgey obtained from other sources corroborating numerous details shown by the Foster records, established probable cause to believe that a pattern of commercial bribery existed at Solomon & Teslovich (*id.* at 32a-33a). The court further found that the warrant sufficiently described the documents to be seized in light of the fact that the affidavit and its supporting documentation showed the existence of an extensive scheme to generate cash by fabricating records maintained in the ordinary course of business, recording the

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[3] "Solomon App." and "Teslovich App." refer to the Record Appendices filed by petitioner Solomon and co-defendant George M. Teslovich, Jr., respectively, in the court below.

payment of numerous bribes with cryptic notations on a wide variety of documents, and concealing the improper payments by scattering fictitious payments to suppliers through the accounting records of the business (*id.* at 36a-37a). Accordingly, the district court concluded that the search of the offices of Solomon & Teslovich on December 19, 1979, was lawful, and it denied petitioners' motion to suppress the evidence seized in that search (*id.* at 38a). The court of appeals affirmed in an unpublished opinion (*id.* at 4a-6a).

ARGUMENT

The court of appeals correctly decided the issues presented. Its unpublished decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Both petitioners contend (83-1231 Pet. 5-11; 83-1291 Pet. 16-27) that the warrant to search the offices of Solomon & Teslovich was not supported by probable cause. Both petitioners assert that, since Foster was not an employee of Solomon & Teslovich, but rather claimed to have learned about its affairs, including the alleged bribery scheme, while she was an employee of SERC, an independent company, the affidavit failed to demonstrate that she had an adequate basis of knowledge for her statements that the sealed records that had been given to her by her supervisor, Phillip Gaziano, were "very incriminating" to Solomon & Teslovich (83-1231 Pet. 7-9; 83-1291 Pet. 20-22).

In *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 15-24, this Court rejected the so-called "two-pronged test," derived from its prior decisions in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), for determining whether an informant's report,

together with any corroboration derived from the government's independent investigative efforts, is sufficient to establish probable cause for the issuance of a search warrant. Instead, the Court held that the existence of probable cause must be judged by the "totality of the circumstances" surrounding the informant's report and the investigation made by the government agents. *Gates,* slip op. 23.

Applying the "totality of the circumstances" test established in *Gates,* the court of appeals correctly concluded that there was probable cause to believe that the records of Solomon & Teslovich contained evidence of crimes, including commercial bribery and racketeering violative of 18 U.S.C. 1962(c). Henrietta Foster was employed by Phillip Gaziano, who, in turn, had been an accountant at Solomon & Teslovich and had married the daughter of one of its principal owners (Pet. App. 13a). While employed by Gaziano, Foster was given two envelopes allegedly containing very incriminating information concerning Solomon & Teslovich and asked to conceal the envelopes by removing them from the premises of her employer (Teslovich App. 35-39). When Gaziano gave Foster the envelopes, he told her that "they were hot, and that if they fell into the wrong hands, they could cause a fire" (*id.* at 37). Foster turned over copies of the records in the envelopes to the government (*id.* at 40, 52-55).

The FBI's analysis of the Foster records, including accountant's workpapers, showed that the proceeds of numerous checks drawn on the corporate checking account of Solomon & Teslovich were being distributed to persons other than the payees (Pet. App. 14a-16a, 18a-24a). Agent Geitgey stated in his affidavit that he was able to establish that the names associated with these payments were not the names of employees who worked at the firms to which the checks were made payable (*id.* at 16a). In addition to petitioners Solomon and Teslovich, the payees shown in the

Foster records included supervisory employees of unions, businesses, and government agencies with which Solomon & Teslovich, Inc. dealt in the course of its business (*id.* at 15a-16a). Geitgey further established that a person identified as an employee of Solomon & Teslovich frequently cashed checks payable to other companies — with scribbled endorsements — in amounts so large that the teller had to get additional cash from the vault (*id.* at 16a).

The magistrate thus was presented with a pattern of unusual transactions apparently designed to generate large amounts of cash and to make numerous cash disbursements to persons who were responsible for monitoring the performance of various types of contractual obligations by Solomon & Teslovich. It is difficult to imagine any reason why an honest businessman would conduct his business in this way, but such practices easily could be used to induce the employees of customers, labor unions, and government agencies to approve substandard work, inferior products, or noncompliance with the terms of labor contracts. In addition, the use of fictitious checks to suppliers and forged endorsements suggests that petitioners, as the principal officers and owners of Solomon & Teslovich, were trying to disguise the payments as legitimate tax deductible business expenses and to conceal the payments. These substantial indications of wrongdoing more than satisfy this Court's practical, common sense criteria for establishing probable cause under a "totality of the circumstances" analysis. See *Gates*, slip op. 15-17, 28-30.

2. Petitioner Solomon argues (83-1291 Pet. 28-36) that the search warrant in this case was overbroad and constituted a general warrant in violation of the Fourth Amendment. As the court of appeals pointed out, however, the degree of particularity required in a warrant "depends on the nature of the suspected criminal activity, the nature of the items to be seized, and the difficulty of specifying

volumes of records covering an extended period" (Pet. App. 4a-5a). See *Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976); *United States* v. *Christine*, 687 F.2d 749, 760 (3d Cir. 1982). As this Court stated in *Andresen*, 427 U.S. at 481 n.10, the "complexity of an illegal scheme may not be used as a shield to avoid detection" by making it practically impossible to satisfy the Fourth Amendment requirement of particularity in the description of the records to be seized.

The search warrant in this case adequately described the things to be seized. In addition to the limitations in the warrant itself with respect to the dates covered and the types of documents sought (see Pet. App. 7a-8a), the warrant referred to the supporting affidavit, which in turn contained a detailed description of the method by which petitioners were carrying out their alleged commercial bribery scheme, together with examples of the types of notations on the books and records of Solomon & Teslovich that were used to conceal the nature of the payments being made and to disguise them as legitimate business expenses (Pet. App. 7a-17a).[4] A warrant may contain a clause authorizing the seizure of things other than those expressly described, provided that it is clear from the context that the additional authority relates to evidence of the crime for which the issuing magistrate found probable cause to authorize a search. *Andresen* v. *Maryland*, 427 U.S. at 480-482; *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, No. 82-5869 (Feb. 22, 1983). The court of appeals

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[4]Petitioner Solomon contends that none of the agents participating in the search received a copy of the affidavit (82-1291 Pet. 32). This is simply wrong. Agent Geitgey testified that, on the day before the search, he briefed the agents who were to participate in it, and that at that briefing he distributed copies of the warrant, the affidavit, and eight specimen pages from the Foster records (Teslovich App. 311-312). In addition, three or four complete copies of the Foster records were available for the agents to examine at the briefing (*ibid.*).

correctly concluded that, in light of the detailed statements in the affidavit, the description in the warrant of the things to be seized was sufficiently specific (Pet. App. 4a-5a). Further review of this essentially fact-bound issue is not warranted.

3. Petitioner Teslovich argues (83-1231 Pet. 11-16) that the seizure of the workpapers of Frank Lucas, the accountant who prepared the federal tax returns of Solomon & Teslovich, exceeded the scope of the warrant. But petitioner Teslovich concedes (83-1231 Pet. 11-12) that the workpapers seized from the office maintained by Lucas on the premises of Solomon & Teslovich were not the property of petitioners and that only Lucas had access to them. Since petitioner Teslovich does not, and could not, assert any legitimate expectation of privacy with respect to Lucas' papers, the court of appeals correctly held (Pet. App. 5a) that his Fourth Amendment rights were not violated by the seizure of these records. See *Rakas* v. *Illinois*, 439 U.S. 128, 132-149 (1978).[5]

4. Finally, petitioner Teslovich contends (83-1231 Pet. 16-18) that the agents failed to prepare an adequate inventory of the items taken in the search. Even if true,[6] petitioner

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[5] *Mancusi* v. *DeForte*, 392 U.S. 364, 368-369 (1968), cited by petitioner Teslovich (83-1231 Pet. 16), is not to the contrary, since in that case it was stipulated that DeForte, the defendant who sought to suppress the evidence seized in a warrantless search of his office, was the custodian of the records seized in the search, even though the office belonged to his employer and the records were official, not personal records. Whatever aid *Mancusi* might give Lucas if he were moving for suppression, it gives none to petitioner Teslovich.

[6] The only defect shown in the record is that the inventory was prepared by an agent other than the applicant for the warrant (see 83-1231 Pet. 16). But the agent who prepared the inventory was one of the two agents who had supervisory responsibility for the search. Thus, it is difficult to see how anyone was prejudiced. As for the specificity of the inventory, the volume of documents seized clearly made it impossible to list each and every one separately.

cites no authority, and we know of none, for the proposition that a violation of the inventory requirement of Fed. R. Crim. P. 41(d) is grounds for the suppression of evidence. The seizure of evidence pursuant to a valid warrant is not converted into a violation of the Fourth Amendment by the failure of the officers responsible for the seizure to comply with the "essentially ministerial" requirements of Fed. R. Crim. P. 41(d). *United States* v. *Hall*, 505 F.2d 961, 963 (3d Cir. 1974). See also *Cady* v. *Dombrowski*, 413 U.S. 433, 449 (1973). And even if the Fourth Amendment were violated by the failure to prepare the inventory properly, we fail to see how any evidence introduced at trial could be said to be a fruit of such an infraction.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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